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In the
Supreme Court of the United States

OCTOBER TERM, 1962

No. 902

HEYMAN MANUFACTURING COMPANY,
PETITIONER,

v.

HAP CORPORATION,
RESPONDENT.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

I.
Introduction

This is a patent case wherein the district court held both claims of plaintiff's (petitioner's) two-claim patent valid and infringed. The three judges of the Court of Appeals for the First Circuit considered first the question of infringement and held "that the evidence viewed most

favorably to Heyman[1] would not warrant a finding of infringement."

The appellate tribunal thereupon reversed the district court's judgment on infringement and ordered stricken from the judgment the holding that plaintiff's patent was valid. Obviously, the Circuit Court did not want a holding of validity of the patent to be outstanding against the public as a result of a private controversy, when the private controversy ended with the holding of non-infringement on both claims of the patent.

Plaintiff thereupon petitioned for rehearing. Not merely was the petition denied; the Circuit Court went further and pointed out that the rationale of its original decision had "undercut" the basis of the district court's original finding of validity. Thus, continued the Circuit Court, its "minimum obligation was to set the finding aside" without implying that either or both of the claims of the patent were invalid, leaving that matter open for future purposes in a contest wherein there was a substantial interest in validity by an opposing litigant. The Court said that whether or not it should have considered validity after reaching a conclusion of non-infringement "was perhaps a question of discretion, but one which we resolved in the negative."

There are no conflicting decisions by different circuits involving the patent here-involved. Nor does the petition present any "special and important" reason to support its desire for grant of the writ.[2] In fact, the phrase "special and important" nowhere appears in the petition. What is involved on the petition is only the plea of error below because plaintiff's patent was not flatly held to be invalid as well as not infringed. Petitioner, we submit, completely misconceives the reviewing function of this Court and seeks

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[1] Plaintiff-petitioner

[2] Rules of the Supreme Court, 19.1

merely a third opportunity to present to this Court the arguments twice before rejected by the full bench of the Court of Appeals for the First Circuit. *Keller* v. *Adams-Campbell Co.* (1924), 264 U.S. 314, 319, put it thusly:

> "Such an ordinary patent case with the usual issues of invention, breadth of claims and non-infringement, this Court will not bring here by certiorari unless it be necessary to reconcile decisions of Circuit Courts of appeal on the same patent."

II.
Citations to Opinions Below

The opinion of November 20, 1962 of the Court of Appeals for the First Circuit is reported at 311 F.2d 839. The opinion in denial of the petition for rehearing on January 9, 1963 is reported at 311 F.2d 844.

III.
Statement by Respondent

The "Statement" by petitioner is misleadingly incomplete. Amplification thereof is required properly to present the background against which intervention of this Court is sought.

In its decision (Appendix A, page 1a),[3] the district court discussed validity and infringement of plaintiff's '738 patent in only a little over a page and a half (pp. 4a, 5a). The findings of fact and conclusions of law, if any, are contained in a total of twenty lines; nine lines on validity —these in the paragraph extending from the bottom of page 4a to line 5 of page 5a—, and eleven lines on infringe-

[3] References herein, unless otherwise noted, indicate pages in the appendices to the petition.

ment—these being contained in the second full paragraph on page 5a. The decision of the appellate court (page 27a) presents the sum and substance of these twenty lines as follows:

> "* * * the court simply states that 'said patent '738 is valid . . . (and that because Hap used in its advertising a copy of a drawing of the plaintiff's product) (t)he conclusion is inescapable that the defendant has deliberately infringed the plaintiff's patent '738 . . .' ".

What the district court thus found and held is merely that plaintiff's patent was valid and infringed.

Petitioner's "statement", at page 4, sets forth merely that "Hap further defended by seeking to establish that the claims in the '738 patent did not cover the blades manufactured by it, and hence were not infringed." On what evidence this defense was presented is nowhere mentioned in the petition, nor is there mentioned the Circuit Court's treatment of the facts and evidence in support of the defense of non-infringement. The fact is that defendant had presented to the district court the Patent Office history of the '738 patent and prior art patents, in addition thereto, and that both in the district court and in the Circuit Court the issue of non-infringement due to limitations imposed by this prior art was the **main** point urged by defendant. Further, it is nowhere indicated by petitioner that the district court failed utterly to reflect an awareness of the effect of the Patent Office history on the scope of the patent claims as bearing on the matter of infringement. Thus it was that the Court of Appeals said, on the question of infringement,

> "* * * the district court gives us no assistance . . . The court did not analyze the claims, or the differences between them." (page 27a)

The Circuit Court, then, studied the Patent Office history and commented repeatedly throughout its decision on the prior art before the Patent Office and the patent examiner's treatment of the claims in view thereof, all in order to be in position to determine what the claims in suit involved. Eliminating from the Circuit Court's decision introductory comment and holdings involving defendant's counterclaim patents (not here involved), it will be seen that the Circuit Court went far beyond the district court's eleven lines to considering the question of infringement. In fact, the Circuit Court occupied well over five pages (pp. 23a-29a) in considering this question, with references to the prior art on every page, thus putting it beyond question that the Circuit Court paid heed to the prior art. Every one of these five pages reflects awareness of the effect of the prior art.[4] To the extent, therefore, that plaintiff's petition makes no mention of this consideration of the art by the Circuit Court, the petition's "Statement" is incomplete and misleading in its ostrich-like effort to keep from this Court what actually took place below. It is fatuity in the extreme, therefore, for plaintiff to assert as basis for the grant of a writ that the Court of Appeals did not consider the prior art. The appeals court did consider the art, and petitioner's Points I, IV, V, VI are seen to be based on the deliberate unwillingness of the plaintiff to acknowledge the conduct of the Court of Appeals in considering the prior art. If there is anything beyond dispute, it is the fact that the

[4] Page 23a, "During the prosecution the examiner pointed out, and the evidence at the trial abundantly shows . . . ."; page 23a, "As the examiner said, ..."; page 24a, "in the light of the claim history"; page 25a, "The file history shows"; page 25a, "he (the examiner) considered it"; page 25a, both footnotes; page 26a, "Throughout the processing the importance of detail was emphasized by the examiner"; page 27a, "This is considered the exact point of novelty"; page 28a, "the accuracy of the examiner's observations"; page 28a, "The examiner was consequently properly insistent upon specificity"; page 29a, "the then state of the art".

Court of Appeals based its action on a full consideration of the Patent Office history and, necessarily, the prior art before the patent examiner and that made of record in the district court. The failure of petitioner to refer to this consideration constitutes a most serious omission in the effort to have this Court go into the case a third time.

Reasons for Denial of the Writ—Argument

POINT I. THE COURT OF APPEALS FOR THE FIRST CIRCUIT DID CONSIDER THE PRIOR ART.

That the Court of Appeals considered the prior state of the art relating to contact blades in formulating its opinion has been fully established in respondent's "Statement" hereinabove. This clearly appears throughout the court's original decision and is confirmed by the statement in the decision denying rehearing (page 32a), that the very rationale of the court's original decision had undercut the district court's holding of validity of plaintiff's patent. Thus to state, as does plaintiff at page 5 of the petition, that

> "* * * in the present case . . . the appellate court reviewed the question of infringement without first considering the prior art"

is to fly in the face of what so plainly appears in both opinions of the Circuit Court (see footnote 4, *supra*). To the extent that petitioner's Points I, IV, V and VI are factually based on this bald mis-statement of the event, the points lack factual support and legal justification.

POINT II. PATENT CASES MAY BE DISPOSED OF ON ALTERNATE GROUNDS: EITHER FOR LACK OF INFRINGEMENT OR FOR INVALIDITY; THERE IS NOT AND THERE NEVER HAS BEEN A MANDATE TO CONSIDER VALIDITY IN EVERY CASE.

In *Keller* (1924), *supra* p. 3, the suit was for infringement of a reissued patent. "All the usual defenses were set up, including lack of invention, the invalidity of the reissue and non-infringement." (264 U.S. 316). The complaint was dismissed and the dismissal affirmed. Certiorari was granted in the belief that the precise scope and extent of the alleged intervening rights should be determined with finality. It developed, however, that "what the courts really held was that the defendant was manufacturing a different invention from that of the plaintiffs, and so could not and did not infringe." (264 U.S. 319). Thereupon the writ was dismissed on the statement quoted at p. 3, *supra*. The matter of validity of the patent was never once mentioned, nor was the propriety of the reissue ever referred to; the case went off on the sole ground of non-infringement.

In *Electrical Fittings Corp.* v. *Thomas & Betts Co.* (1939), 307 U.S. 241, there was involved—as here—a two-claim patent. The district court decreed claim 1 valid but not infringed and claim 2 invalid. It was the *defendants* who appealed from the holding of validity. The Circuit Court dismissed the appeal on the ground that the defendant-petitioners "had been awarded all the relief to which they were entitled, the litigation having finally terminated in their favor." Defendants brought *Electrical Fittings* before the Supreme Court, which thereupon held,

> "Instead of dismissing the bill *without more*,[5] it (the district court) entered a decree adjudging claim 1 valid but dismissing the bill for failure to prove infringement.
>
> • • • •
>
> "We think the petitioners were entitled to have this portion of the decree eliminated." (307 U.S. 242)

Apart from the fact that defendants therein brought *Electrical Fittings* before this court, the facts therein and at bar are the same. Under *Electrical Fittings*, if the court below had permitted the decree of validity of plaintiff's '738 patent to stand, while dismissing the complaint for non-infringement, the defendant-respondent here would have been entitled to petition this Court for reformation of the decree and, paraphrasing, to have the validity-holding portion of the decree eliminated. It is to have been expected that petitioner would make no reference to *Electrical Fittings*. Any reference would constitute an acknowledgment that the present set of facts are controlled by the decision therein.

In *Altvater* v. *Freeman* (1943), 319 U.S. 359, two reissue patents had been secured on the surrender of the original patent. Suit was brought charging, among other things, infringement of **one** reissue. The charge was denied and the suit defended further on the ground that the reissue was invalid. In addition, defendant counterclaimed for a declaratory judgment that the **second** reissue also was invalid. The district court dismissed the complaint and sustained the counterclaim (319 U.S. 362). While the Circuit Court affirmed, it modified the decree by eliminating therefrom the holdings that both patents were invalid, doing so on the ground that the issues were moot. The Supreme

[5] Emphasis applied throughout.

Court, citing *Electrical Fittings*, and stating (319 U.S. 363) that

> "* * * To hold a patent valid if it is not infringed is to decide a hypothetical case.",

sent *Altvater* back for disposition of the questions of validity raised by the counterclaim, these obviously going far beyond the issues framed by the complaint and answer in the involvement of the *second* reissue patent. Clearly, if only the *one* reissue and all claims thereof had been involved, there would have been no need to send the case back since the findings of non-infringement would have disposed of all issues therein under *Electrical Fittings*. (The finding of validity would have been immaterial to the disposition of the cause). In *Altvater* however, two patents were involved with

> "* * * many claims in addition to the single one involved in the issue of infringement. And petitioners were manufacturing and selling additional articles claimed to fall under the patents. Royalties were being demanded and royalties were being paid. But they were being paid under protest and under the compulsion of an injunction decree. It was to lift the heavy hand of that tribute from the business that the counterclaim was filed.",

and so this Court concluded in *Altvater* by ruling that

> "* * * it was error for the Circuit Court of Appeals to have treated the issues raised by the counterclaim as moot. They were not moot; and the District Court had passed on them. Accordingly, the Circuit Court of Appeals should have reviewed that adjudication." (319 U.S. 365, 366).

Straining to find conflict in decisions, petitioner advances the theory that the prior art must first be studied to determine if the patent is valid and that only then can the matter of infringement be determined. Petitioner cites no single decision in support of this theory. *Eibel* (referred to at page 5) merely states that even a slight advance may be meritorious and entitled to protection(261 U.S. 63) and with this we have no quarrel. *Eibel*, however, has nothing to do with the proposition that infringement cannot be determined until after validity has been established. Actually, this is reflected by the statement at the foot of page 5 of the petition, to the effect that *Aitraler* "appears to be in conflict with" *Eibel*, and, of course, what follows this expression of doubt has already been established as contrary to the fact since the Circuit Court did examine the prior art. Plaintiff's POINT I is thus without factual or legal merit.

We are in full accord with the title heading of petitioner's POINT II. However, the appellate tribunal below disposed of the proposition; first, by pointing out that the district court had made no findings on infringement (page 27a) and, second, in holding that there was—in fact—no infringement and inevitably that what the district court concluded was clearly erroneous. It could not have reversed the district court without such conclusion, 52 (a) F.R.C.P. (page 33a, lines 8-11). Note also the reference to "the undisputed evidence" at page 28a. It is clear that the "due weight" was given to what it was that the district court found and decided. POINT II of the petition, therefore, similarly fails to justify grant of the writ sought.

As has been shown above and as will be demonstrated below, petitioner's POINT III has no relation to what is here involved. Even if we assume that plaintiff's patent is valid, a finding of validity may not be continued in the judgment if the patent is not infringed. That was settled

by *Electrical Fittings Corp.* v. *Thomas & Betts Co.*, *supra*, p. 7. Point III of the petition is thus quite beside the point.

Sinclair & Carroll Co. v. *Interchemical Corp.*, 325 U.S. 327, was decided in 1945. It contained the following statement at 325 U.S. 330:

> "There has been a tendency among the lower federal courts in infringement suits to dispose of them where possible on the ground of non-infringement without going into the question of validity of the patent. Irvin v. Buick Motor Co., 88 F.2d 947, 951; Aero Spark Plug Co. v. B. G. Corp., 130 F.2d 290; Franklin v. Masonite Corp., 132 F.2d 800. It has come to be recognized, however, that of the two questions, validity has the greater public importance, Coyer v. Schwartz, 133 F.2d 544, and the District Court in this case followed what will **usually** be the better practice by inquiring fully into the validity of this patent."

The significant word is the emphasized "usually" and it is important to note how the quotation above has since been construed by subsequent action of this Court and by the various circuit courts.

The First Circuit decided *Grant Paper Box Co.* v. *Russell Box Co.*, 151 F.2d 886, shortly after *Sinclair* came down. It repeated the above quotation therefrom and—in the light of *Altvater*—interpreted it as permitting the lower courts to exercise discretion in disposing of patent litigation, stating (151 F.2d 890).

> "* * * In this logical dilemma the courts have wisely taken a practical course. They have decided cases of this sort, whenever they must be decided against the plaintiff, on whichever issue must be resolved against

> him, subject, however, to the qualification that *sometimes*, even when a patent is not infringed, it is proper to go further and in the public interest to declare a patent *invalid* if in discretion the circumstances presented make such a course seem appropriate."

The emphasized words indicate that decision need not be made in all cases and they make clear that validity will not be found of an uninfringed patent. That *Grant* went off on validity reflects only that the discretion of the court in disposing of the case was exercised in that direction.

Hawley Products Company v. *United States Trunk Co.*, (1 Cir., 1958), 259 F.2d 69, at 75, reflects a full awareness of the point. It cited *Altvater* as authority for the proposition that "a court retains jurisdiction to hold a patent **invalid** even after it had been found not infringed." The use of the word "invalid" is most significant because the court did not construe *Altvater* as permitting a patent to be held valid after it had been found not infringed and it followed *Altvater* in considering validity only because the controversy between the parties had not been laid to rest by the holding of non-infringement. This is indisputable from what is said at 259 F.2d 76 (right column, first full paragraph).

There is no such incompatibility as petitioner pretends (Point V, page 13). Once non-infringement has been found, validity is moot (under *Electrical Fittings* and *Altvater*). **Invalidity**, however, may be established in the court's discretion (*Altvater* and *Sinclair & Carroll*).

Crampton Mfg. Co. v. *Crampton* (6 Cir. 1946), 153 F.2d 543, held certain claims of the patent there involved as valid but not infringed. Judge Simons dissented (153 F.2d 547) on *Altvater* and *Electrical Fittings*, and referred to *Grant* and *Sinclair & Carroll* as supporting doubt on the proposition that validity, in such context, need be decided.

The Supreme Court denied certiorari, 328 U.S. 840, 90 L. Ed. 1615, 66 S. Ct. 1017. However, the majority decision in *Crampton* has not since been cited or followed for the point here involved.

The Sixth Circuit thereafter (1952) decided *Dow Chemical Co.* v. *Skinner*, 197 F.2d 807. It referred to *Electrical Fittings Altvater* v. *Freeman* and quoted from *Sinclair & Carroll*, as above, and then said (197 F.2d 812):

> "Electrical Fittings Corp. v. Thomas & Betts Co., supra, and Altvater v. Freeman, supra, are not cited. In view of the wording of the paragraph quoted we think that a discretion resides in the lower courts to determine whether or not decision upon validity is required. The Supreme Court employed the significant word 'usually', thus indicating that a ruling upon validity is not essential in all cases involving both infringement and validity."

Certiorari was denied, 344 U.S. 856, 97 L. Ed. 664, 73 S. Ct. 94. It is clear, therefore, that in the Sixth Circuit only the minority opinion of Circuit Judge Simons, in *Crampton*, is being accepted as the law to be followed.

That the Sixth Circuit, in 1961, considered validity over a finding of non-infringement of one patent, *Sparton Corp.* v. *Evans Products Co.*, 293 F.2d 699, was occasioned by the fact that validity and infringement had been found of two other patents involved in that litigation. The Court, however, clearly set forth its appreciation of the fact that it was exercising its discretion—in these circumstances—on the authority of *Sinclair & Carroll*, *Electrical Fittings* and *Altvater*, 293 F.2d 705. Certiorari was denied, 368 U.S. 967, 7 L. Ed. 2d 395, 82 S. Ct. 439.

The decision in *Harries* v. *Air King Products Co.* (2 Cir., 1950), 183 F.2d 158, was written by Learned Hand (then

Chief Judge of the Second Circuit). He construed *Electrical Fittings, supra*, p. 7, as

> "* * * clearly a holding that it is not in all cases necessary to decide the issue of validity." (183 F.2d 161)

Judge Hand noted that this Court had cited *Cover v. Schwartz* (2 Cir., 1943), 133 F.2d 541, as support for the statement in *Altvater* that "to hold a patent valid if it is not infringed is to decide a hypothetical case". Adverting then to *Sinclair & Carroll*, Judge Hand pointed out (183 F.2d 162) that the oft-quoted statement in *Sinclair:*

> "* * * was certainly not put in the form of a peremptory direction, but rather of a cautionary admonition, to be followed **when that is the more convenient course;** and it is thus that Woodbury, J., construed it in Grant Paper Box Co. v. Russell Box Co., (cited *supra*). We are disposed so to understand it in the case at bar."

and he continued to set forth "good reasons for allowing some latitude of choice" as between infringement and validity, the latter issue being "as fugitive, impalpable, wayward, and vague a phantom as exists in the whole paraphernalia of legal concepts." He concluded, therefore, (183 F.2d 163),

> "* * * we hold that it is open to a court to proceed as is most convenient, subject to the exception that, although a defendant has not infringed, claims may be so evidently **invalid** that the court should so declare."

Note the "invalid"; it being clear that after non-infringement was found, validity need not be considered and could not be decreed—if found—under *Electrical Fittings* and *Altvater*."

Sinclair & Carroll was carefully noted in the recent decision in *Parmalee Pharmaceutical Company* v. *Zink*[5] (8 Cir., 1961), 285 F.2d 465, yet it considered only infringement, found a lack of it, and would not send the case back for findings upon which to base a decision on validity (285 F.2d 468). Inherent in the action of the Eighth Circuit was the conclusion that it was more convenient to dispose of the controversy on the ground of non-infringement than on validity, even with some doubt on validity expressed.

The Fifth Circuit was also aware of *Sinclair & Carroll* when it decided *Industrial Instrument Corporation* v. *The Foxboro Company* in September of 1962, 307 F.2d 783, 786, and said,

> "* * * it was not error for the court to rule on non-infringement without first ruling on validity where such a narrow improvement patent is involved[6] and its validity vel non is of no great public importance."

Patent Scaffolding Co. Inc. v. *Up-Right, Inc.* (9 Cir., 1952), 194 F.2d 457, is most pertinent. The patent was held not infringed by the district court, who dismissed the complaint despite the fact that the jury had decided the patent to be both valid and infringed. The prevailing *defendant* appealed, seeking also a holding of invalidity of the patent. *Electrical Fittings* was differentiated on the ground that in *Up-Right* there was no finding of validity to set aside. *Altvater* was differentiated also, on the ground

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[6] The Patent Office and the Court below both emphasized the narrowness of whatever it was that the patent in suit covered (page 23a).

that its continued discussion of validity was occasioned by the presence of additional claims, claims other than those held not-infringed. *Sinclair & Carroll* was noted, the "better practice" therein was referred to, and the question of the mandatory nature thereof considered (194 F.2d 458, 459). The Court held, at page 461, that the appellant in *Up-Right* "has no standing to require us to inquire whether the trial court should have based its judgment in appellant's favor upon two grounds, rather than upon one.", and said:

> "We find nothing in Interchemical that suggests otherwise.",

this, of course, is in full agreement with the Second Circuit's decision in *Harries* and with the interpretation of *Sinclair & Carroll* v. *Interchemical* by the First, Fifth, Sixth and Eighth Circuits. Certiorari was denied, 343 U.S. 958, 96 L. Ed. 1357, 72 S. Ct. 1053.

In 1953, the same Ninth Circuit decided *Kemart Corp.* v. *Printing Arts Research Labyratories, Inc.*, 201 F.2d 624, in which the validity and infringement of a number of claims were involved. The district court held certain claims valid and infringed and others not infringed. On appeal, the Circuit Court first described the patented process and then said,

> "Since we are of the opinion that the Marx patent is not infringed by appellant's process, we shall proceed immediately to discuss that question." (201 F.2d 627).

It held all the claims not infringed and ordered stricken from the judgment below that portion which held the claims valid, stating, against the background support of *Electrical*

Fittings, Alltrater and *Sinclair & Carroll*[7] (201 F.2d 634), that

> "We believe it unnecessary to discuss the question of validity. In oral argument counsel for appellant stated that appellant had no interest in the question of validity of the patent if it should be held uninfringed. It has been said by the Supreme Court that it is the 'better practice' always[8] to pass upon the question of validity. This language has been generally understood as a mere cautionary admonition to the courts to exercise their discretion whether to pass upon the question of validity, and to strike down clearly **invalid** patents where it would be in the public interest to do so, even though a finding of non-infringement would dispose of the case. A court may not, however, find a patent uninfringed and at the same time hold it valid, since a holding of validity would be a decision of a hypothetical case. **Thus, if we should go fully into the question of validity of the Marx Patent here**, an issue which is as 'fugitive, impalpable, wayward, and vague a phantom as exists in the whole paraphernalia of legal concepts', **and should conclude that the patent is valid, we should not be able to so hold.** Suffice it to say that the patent in suit is not clearly invalid. A brief study of this patent against the background of the prior art leads to quite the contrary conclusion, but a decision on this question should await a case requiring it."

The petition cites no decision to the effect that validity must be decided in cases where non-infringement has first been found. Actually, the Patent Act of 1952, 35 U.S.C.

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[7] Also *Dow Chemical, supra*, of the Sixth Circuit and *Harris v. Air King, supra*, of the Second Circuit.

[8] The Supreme Court said "usually"; not "always".

282 supports the proposition that non-infringement alone is enough to defeat a patent infringement suit, without more, in listing first the defense of non-infringement, (page 34a).

Plaintiff's heading of POINT IV is only partly correct. A claim may be held to be not infringed merely on a reading thereof if the accused device, on its face, falls outside the substance and language of the claim. Ordinarily, however, the prior art must be looked to in order to determine what the claim means and then compared with the accused device. This, of course, is precisely what the Court of Appeals below did and thus POINT IV falls for lack of factual support.

We submit that plaintiff's POINT V requires no extended comment. The law settled by this Court and by decisions of the various Circuit Courts thereafter is to the effect that it is not mandatory to pass upon validity if the patent be held not infringed. The law actually prohibits a holding of validity if the patent be held not infringed. Plaintiff's quotation from *Hawley*, at page 14, overlooks the fact that in *Altvater* the decision also involved portions of the controversy which were not finally settled by the finding of non-infringement, and that that was the reason why in *Altvater* the case was sent back for determination of validity. So much clearly appears from the 4th syllabus at 319 U.S. 359. Contradiction is apparent only to petitioner, but to no one else. Certainly, no court has noted any contradiction.

Plaintiff's POINT VI is an expression of hope; not of fact. There are no conflicting decisions involving plaintiff's patent. There are no conflicting decisions to be reconciled involving any principle of patent law. The use of this private controversy to raise an issue of public importance is not justified, and the accusation of unfairness levelled at the Court of Appeals for the First Circuit as at the very end of POINT VI, page 16, simply because plaintiff has lost

its law suit, is even less proper, warranting "sharper comment" (see the second footnote to the Circuit Court's decision, at page 25 of the appendix to the petition).

V.
Conclusion

We have set forth and discussed only those facts required for an understanding of the problem presented by the petition. We do not believe this Court desires full argument of the issue of non-intringement, nor do we believe this Court would tolerate any full argument of the issue of validity. The applicable statutes and principles of law were applied by the Court of Appeals and the patent claims construed in the light of the prior art and the patent's prosecution. Since the petitioner lost, and the loss affirmed by the denial of rehearing, it seeks instead to create a something special to warrant review by this Court. The questions it poses find no support in the record, and the points it argues similarly find no support either in the record or in the applicable case or statute law. The petition, therefore, should be denied.

Respectfully submitted,

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